Supreme Court, U.S.
FILED
04 327 SEP 3 - 2004
OFFICE OF THE CLERK

No. 04-

In the
Supreme Court of the United States

SSA GULF, INC.,
PETITIONER,

v.

EUNICE HERNANDEZ, INDIVIDUALLY AND
ON BEHALF OF DECEDENT, JOSEPH HERNANDEZ,
RESPONDENT.

On Petition For a Writ Of Certiorari To
The U.S. Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*, wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the nominal respondent in the court of appeals was the Honorable Lance Africk, Judge, United States District Court for the Eastern District of Louisiana.

The following parties were defendants in the district court but did not enter an appearance in the court of appeals: Todd Shipyards Corporation; Fidelity & Casualty Company; Garlock Sealing Technologies, LLC (formerly known as Garlock, Inc.); Eagle, Inc.; Cooper/T. Smith Stevedoring Company, Inc.; P&O Ports Gulfport, Inc. (formerly known as Atlantic & Gulf Stevedores, Inc.); Strachan Shipping Company; Biehl & Co., Inc. (formerly known as Young & Co., Inc.); James J. Flanagan Shipping Corporation; Mid-Gulf Stevedores, Inc.; Argonaut Insurance Company.

RULE 29.6 STATEMENT

Petitioner SSA Gulf, Inc., formerly known as SSA Gulf Terminals, Inc. and Ryan-Walsh Stevedoring, states that its parent company is SSA Marine, Inc. No publicly held company owns more than 10% of SSA Gulf's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner SSA Gulf, Inc. ("SSA Gulf") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's order (Pet. App. 1a) denying the petition for writ of mandamus is unreported. The opinion of the district court (*id.* 2a-11a) is reported at 2004 WL 1543184 and 2004 U.S. Dist. LEXIS 12777.

JURISDICTION

The order of the court of appeals was entered on July 22, 2004. Pet. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 5 of the Longshore and Harbor Workers' Compensation Act ("LHWCA") provides in relevant part:

> The liability of an employer prescribed in section 4 [33 U.S.C. § 904] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death.

33 U.S.C. § 905(a).

STATEMENT OF THE CASE

1. Statutory background.

The Longshore and Harbor Workers' Compensation Act ("LHWCA"), 44 Stat. 1424, as amended, 33 U.S.C. § 901 *et seq.*," is a comprehensive scheme to provide compensation 'in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon the navigable waters of the United States,'" including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 294 (1995) (quoting 33 U.S.C. § 903(a)). The Act focuses primarily on such occupations as longshore and harbor workers, ship repair personnel, shipbuilders, and shipbreakers. Under the LHWCA, nonseaman maritime workers, as defined in § 902(3), are afforded no-fault workers' compensation claims against their employers, *see* § 904(b) and negligence claims against vessels, *see* § 905(b), for injury and death.

The LHWCA creates a comprehensive scheme for claims by eligible workers. The program is administered by the Secretary of Labor through the Director of Office of Workers' Compensation Programs. 33 U.S.C. § 939. The Act prescribes detailed procedures for the filing and processing of claims. §§ 913-14, 919-20. Any claim for benefits must proceed exclusively before an administrative law judge ("ALJ"), and any challenge to the ALJ's ruling must first be reviewed by the Benefits Review Board ("Board"). §§ 919(a), 921(b). Any appeal from the Board's decision must be filed in a United States Court of Appeals. § 921(c).

The LHWCA provides formulae for the computation of benefits for disability or death based on the employee's weekly wages. §§ 908-09, 910. The Act contains rules for the payment of compensation where third parties may be liable, § 933; for the

modification of awards, § 922; and for the regulation of attorneys' fees. § 928.

Under the authority of the LHWCA, the Secretary of Labor has promulgated a detailed set of regulations implementing all portions of the Act. *See* 20 C.F.R. §§ 701-704. The regulations provide rules for claims relating to occupational diseases. § 702.602-604. This Court has recognized that a shipfitter suffering from employment-related asbestos disease is entitled to administrative compensation from his employer under the LHWCA. *See Ingalls Shipbuilding v. Director, Office of Workers' Compensation Programs, DOL*, 519 U.S. 248, 251 (1997).

The regulations also address the procedures for the payment of uncontested claims, 20 C.F.R. § 702.231; the entry of settlement agreements, §§ 702.242-243; and the processing of controverted claims, §§ 702.251-274, 301-349. The rules governing the conduct of formal hearings include provisions regarding depositions, interrogatories, evidence, witnesses, oral arguments, and written submissions. The regulations also provide for the modification of compensation awards and payment of supplemental compensation. § 702.372-373.

The comprehensive statutory framework does not permit a longshore worker to sue a stevedore employer for tort damages in state court. Indeed, central to the LHWCA is the exclusivity provision of Section 5, which provides that the liability of an employer under the LHWCA "shall be exclusive and in place of all other liability" to the employee, "his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." § 905(a).

2. Proceedings in this case.

Respondent filed the instant lawsuit in Louisiana state court, Orleans Parish. The suit alleged that, while Joseph Hernandez

was employed with SSA Gulf and other stevedoring companies, he loaded, unloaded, and handled raw asbestos fibers and asbestos cargo at the Port of New Orleans. According to the lawsuit, the exposure between 1964 and 1985 contributed to his mesothelioma from which he died on July 18, 2003. The lawsuit seeks a host of damages inconsistent with the LHWCA, including damages for physical and mental pain and suffering, fear of dying, loss of enjoyment of life, loss of consortium, loss of spousal affection, and "anguish and grief."

SSA Gulf timely removed this case under 28 U.S.C. § 1441(b), on the grounds that the LHWCA wholly displaces and preempts state-law tort claims against stevedore employers so as to come within federal question jurisdiction pursuant to 28 U.S.C. § 1331. The removal was joined by all defendants who had been served at the time of removal. By separate pleadings, petitioner and other stevedore defendants filed a Rule 12(b)(6) motion to dismiss on the ground that the LHWCA, as respondent's sole and exclusive remedy, completely preempts any state-law claims against stevedore employers.

The district court entered an order of remand without deciding whether the LHWCA completely preempts state-law claims against stevedore employers and without reaching petitioner's Rule 12(b)(6) motion to dismiss based upon the exclusive remedy provisions of the LHWCA. Instead, the district court opined that the LHWCA does not provide a basis for removal of purely state-law claims. Pet. App. 9a. "[T]he LHWCA contains no civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court." *Id.* at 8a. "[T]he LHWCA does not contain a specific jurisdictional grant to the federal courts for the enforcement of a right created by the LHWCA." *Id.* Citing *Garcia v. Amfels, Inc.*, 254 F.3d 585, 588 (5th Cir. 2001), and *Aaron v National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert denied*, 493 U.S. 1074 (1990), the district court held that there was no federal question jurisdiction in this case. Pet.

App. 9a.

SSA Gulf filed a petition for writ of mandamus presenting the question whether the LHWCA creates federal question jurisdiction for removal purposes because it completely preempts state-law tort claims against stevedore employers. Respondent filed a response. By order of July 22, 2004, the Fifth Circuit denied the petition. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

This case presents the question whether the LHWCA triggers federal question jurisdiction under the "complete preemption" doctrine. The district court below held that the LHWCA does not create such jurisdiction, and the Fifth Circuit refused to disturb its judgment. However, the rule in this case, if left uncorrected, would cause substantial disruption of the statutory scheme enacted by Congress. The LHWCA represents a comprehensive scheme for the compensation of longshore workers and strikes a careful balance among numerous competing interests. The decisions in this case would upset that balance. There is no room in the LHWCA for state-law tort claims, and no room for state courts to make benefit or coverage determinations.

Further, the rule in this case conflicts with decisions of this Court and of the U.S. Court of Appeals for the Fourth Circuit. The Fifth Circuit decisions on which the district court relied are obsolete and rest on a view of the "complete preemption" doctrine that has been changed by this Court. Accordingly, this Court's plenary review is urgently needed.

In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004). Although this Court's decision in *Davila* was issued prior to the Fifth Circuit order in this case, and although SSA Gulf's petition for mandamus cited *Davila*, the Fifth Circuit's order is inconsistent

with *Davila*.[1]

A. The Decisions Below Conflict With A Holding Of The Fourth Circuit.

The rule followed by the courts below is inconsistent with the decision of the U.S. Court of Appeals for the Fourth Circuit in an indistinguishable case. Certiorari is therefore amply warranted.

In *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998), the Fourth Circuit held that a federal district court erred in remanding to state court a lawsuit by a harbor worker against his employer. The Fourth Circuit held that "[t]he question of whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Id.* at 167. "An LHWCA claim must be filed with the Department of Labor where it is assigned to an administrative law judge whose decision is reviewed by the Benefits Review Board. Review by the courts is authorized through a petition for review, which may be filed only in the [federal] courts of appeals . . . ." *Id.* at 171. State courts "do not have jurisdiction over LHWCA cases." *Id.* The Fourth Circuit

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[1] This Court has frequently GVR'ed cases even whether the lower court decision was issued after the governing Supreme Court opinion. *See, e.g.*, No. 97-8284, *Schweninger* v. *Minnesota*, 525 U.S. 802 (1998) (remanded in light of *Kansas* v. *Hendricks*, 521 U.S. 346 (1997)); No. 97-7931, *Coleman* v. *Minnesota*, 524 U.S. 924 (1998) (same); No. 97-5901, *Hodgkiss* v. *United States*, 522 U.S. 1012 (1997) (remanded in light of *Bailey* v. *United States*, 516 U.S. 137 (1995)); No. 90-1936, *Parker Solvents* v. *Royal Ins. Cos. of Am.*, 502 U.S. 801 (1991) (remanded in light of *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991), decided a few days before lower court's decision); No. 90-524, *Connecticut* v. *Geisler*, 498 U.S. 1019 (1991) (remanded in light of *New York* v. *Harris*, 495 U.S. 14 (1990), decided three weeks before lower court's opinion); No. 89-5991, *Patterson* v. *South Carolina*, 493 U.S. 1013 (1990) (remanded in light of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987)); No. 89-401, *Wecht* v. *Inmates of Allegheny County*, 493 U.S. 948 (1989) (remanded in light of *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981)).

explained that, "if we were to [remand this case to state court], we would be committing the federal question of LHWCA coverage to the state court when Congress intended that it be decided exclusively in federal court." *Id.* The court of appeals opined that, because the LHWCA administrative remedy is exclusive, the only proper course was dismissal of the case: "the district court should not have remanded the case to state court, but should have dismissed it." *Id.*

The decisions of the courts below are utterly irreconcilable with the holding of the Fourth Circuit in *Shives*. The Fourth Circuit held that, when a state-court action against a stevedore employer is removed to federal district court, the proper remedy is dismissal, not remand. The courts below followed the opposite rule. In the Fourth Circuit, longshore and harbor workers who attempt to file state-court actions against their employers will properly be remitted to their administrative remedies. Under the rule followed in the case at bar, longshore and harbor workers will instead be allowed to pursue their tort actions in the state courts, subject only to this Court's discretionary review via its certiorari jurisdiction. State-court judges and potentially state-court juries will decide issues of LHWCA benefits and coverage.

Circuit-to-circuit variation in the administration of the LHWCA would be intolerable. Shipping is inherently an interstate and indeed international form of commerce. Operations cannot be confined to the boundaries of a particular state or judicial circuit. If stevedore activities in New Orleans and South Carolina are subject to different rules, then commerce will be hampered, and Congress' goal of a uniform national system of compensation will be frustrated.

The decisions below are not only in conflict with the holding of the Fourth Circuit; they are also in tension with the rulings of other circuits that have given proper weight to the exclusive remedy provision of Section 5(a) and have recognized its

preemptive effect on state law. *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 343 F.3d 10, 14 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 1414 (2004) ("employees covered by the LHWCA are statutorily barred from suing their employers for injuries incurred in the course of their employment"); *Gravatt v. City of New York*, 226 F.3d 108, 111 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001) (longshore worker "has no tort remedy against S&B in its capacity as his employer"); *Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 144 (4th Cir. 2000) (LHWCA "is the exclusive remedy against employers for injuries suffered by maritime workers"); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 293 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993) ("The LHWCA provides the exclusive remedy for an employee who is subject to the Act's provisions and who is injured on the job."); *Sample v. Johnson*, 771 F.2d 1335, 1346-47 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986) (§ 5(a)'s preemptive effect should be construed broadly).

This Court's review is therefore amply warranted.

B. The Decisions Below Conflict With Governing Precedent of this Court Regarding the "Complete Preemption" Doctrine.

Certiorari is necessary for a further reason: The rule in this case conflicts with decisions of this Court regarding the "complete preemption" doctrine. This doctrine reflects the recognition that, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

This Court first recognized the complete preemption doctrine in *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968). In

Avco, an employer sought an injunction in state court to bar the defendant labor union from striking. The union removed the suit to federal court, and this Court upheld the removal, opining that Section 301 of the Labor Management Relations Act ("LMRA") so completely preempts state law that the employer's complaint should be considered as arising under Section 301. 390 U.S. at 560. The necessary ground of decision in *Avco* was that "the preemptive force of § 301 is so powerful as to displace entirely any state cause of action for violations of contracts between an employer and a labor organization. . . . Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. . . . *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 23-24 (1983). *See also Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998) ("Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law") (internal quotation marks omitted).

In recent years, this Court has issued two important decisions revising and clarifying the complete preemption doctrine. In *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), this Court held that causes of action for usury filed in state courts against national banks are removable to district court under § 1441(b) as "arising under" federal law – even when federal law is not mentioned in the complaint. Most recently, this Court invoked the complete preemption doctrine in *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004), which held that when a federal statute (in that case, ERISA) completely preempts a state-law cause of action, the state case may be removed to federal court.

In both *Beneficial Nat'l Bank* and *Davila*, this Court

instructed that the principal focus of complete preemption should be on whether the federal statutory scheme comprehensively displaces the state law at issue. The rulings of the courts below cannot be reconciled with this Court's decisions, particularly its recent holdings. The Fifth Circuit authority cited by the district court is obsolete and represents a view of the complete preemption doctrine that has been rejected by this Court.

1. The Courts Below Applied An Obsolete Legal Standard Regarding The Complete Preemption Doctrine.

The district court held that the LHWCA does not create federal question jurisdiction because it "contains no civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court" and "does not contain a specific jurisdictional grant to the federal courts for the enforcement of a right created by the LHWCA." Pet. App. 8a. In fact, the LHWCA contains provisions for federal court review and for the enforcement of federal rights. The Act provides that "[a]ny person adversely affected or aggrieved by a final order of the [Benefits Review] Board may obtain a review of that order in the United States court of appeals." § 921(c). The LHWCA also provides that district courts may enforce federal rights under the Act by issuing injunctions against employers not in compliance with compensation orders. *See* § 921(d). The district court's description of the LHWCA was inaccurate.

Moreover, the district court's opinion demonstrates why the legal standard followed by the courts below conflicts with this Court's precedent – particularly the recent decisions of *Beneficial National Bank* and *Davila*. These recent decisions have refined and clarified the complete preemption doctrine by making clear that the relevant issue is Congress' intent to completely displace state law through the enactment of a comprehensive statutory scheme. In *Beneficial National Bank*, for example, this Court made clear that the existence of a

comprehensively preemptive federal statute means that any assertion of a state-law cause of action necessarily raises a federal question: "When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law. This claim is then removable under 28 U.S.C. § 1441(b) . . . ." 539 U.S. at 8.

This Court reaffirmed the same principle in *Davila*: "When a federal statute wholly displaces the state-law cause of action through complete pre-emption, the state claim can be removed." 124 S. Ct. at 2495 (internal quotation marks omitted). Thus, by creating a comprehensive federal scheme providing the exclusive remedy against stevedore employers, and by eliminating all related state-created rights, the LHWCA gives rise to federal question jurisdiction under the complete preemption doctrine.

Tellingly, in both *Beneficial National Bank* and *Davila*, this Court focused on the federal interest in preserving the uniformity of a comprehensive statutory scheme – the same federal interest that lies at the heart of the LHWCA. In *Beneficial National Bank*, this Court observed that "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation." 539 U.S. at 10 (internal quotation marks omitted). "The same federal interest . . . supports the established interpretation of [the National Bank Act] that gives those provisions the requisite pre-emptive force to provide removal jurisdiction." *Id.* at 11.

In *Davila*, this Court pointed to "Congress' purpose [in ERISA] of creating a comprehensive statute for the regulation of employee benefit plans." 124 S. Ct. at 2495. "Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Id.*

Precisely the same reasoning is applicable in the context of the LHWCA, which creates a comprehensive federal scheme that (as discussed further in Part D, *infra*) would be disrupted by state-court causes of action. Congress plainly intended the LHWCA administrative remedy to be exclusive.

Although the statutes at issue in *Beneficial National Bank* and *Davila* contained federal private rights of action, nothing in this Court's reasoning indicated that the presence of a federal "civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court" (Pet. App. 8a) was a *sine qua non* of the complete preemption doctrine. This Court should grant review in this case to make clear that the existence of a civil enforcement section that confers a private cause of action is merely an indicator of Congress intent, not an independent requirement of complete preemption. Indeed, in the case of a workers' compensation statute like the LHWCA, it makes little sense to examine the federal statute for evidence of "a federal cause of action that could be litigated in either federal or state court." Pet. App. 8a. The entire thrust of an administrative compensation scheme like the LWHCA is *not* to create a judicially enforceable damages action but rather to keep claims *out of the courts.* Instead of trying to identify congressional intent, the courts below affirmatively frustrated it. The LHWCA's creation of an exclusive federal remedy in the form of a right to administrative compensation should have been enough to satisfy the complete preemption doctrine.

Nor does the complete preemption doctrine require a "specific jurisdictional grant to the federal courts," as the district court erroneously asserted. Pet. App. 8a. In fact, in *Beneficial Nat'l Bank*, this Court instructed that "the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable." 539 U.S. at 9 n.5.

To the extent that Fifth Circuit decisions cited by the district

court say otherwise, they are contrary to the recent decisions of this Court and further underscore the need for this Court's review. For example, the district court relied extensively on *Aaron v National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert denied*, 493 U.S. 1074 (1990) (cited at Pet. App. 6a, 8a, 9a), which opined that "the preemptive force necessary to create removal jurisdiction should only be held to exist when 'Congress has clearly manifested an intent to make causes of action . . . removable to federal court.'" *Id.* at 1163 (quoting *Taylor*, 481 U.S. at 68 (Brennan, J., concurring)). The concurring opinion cited by *Aaron* is plainly *not* the law after *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5, if indeed it ever represented the law. Because the courts below applied an improper legal test that conflicts with governing precedent of this Court, certiorari is amply warranted.

2. This Court Should Grant Review To Continue To Clarify The Complete Preemption Doctrine.

This case presents an ideal opportunity to continue the clarification of the complete preemption doctrine – an effort already begun in *Beneficial National Bank* and *Davila*. Certain lower courts have perceptively recognized that "[t]h[e] analytical framework has been changed by" *Beneficial Nat'l Bank*. *See Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 304 (2d Cir. 2004). "Given the Supreme Court's approach in *[Beneficial Nat'l Bank]*, we conclude that it means to extend the complete preemption doctrine to any federal statute that both preempts state law and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of action." *Id.* at 305. *See also* Richard H. Fallon, Jr. et al., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 22 (5th ed. Supp. 2003) (reaching the same conclusion).

However, other lower courts have expressed confusion over the complete preemption doctrine, describing it as a "doctrinal minefield." *Lippitt v. Raymond James Fin. Servs.*, 340 F.3d

1033, 1041 (9th Cir. 2003). *See also Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1014 (11th Cir. 2003) (complete preemption doctrine is "often confused"); *Sonoco Prods. Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 371 (4th Cir. 2003) ("the doctrines of conflict preemption and complete preemption are important, and they are often confused"); *Blab T.V., Inc. v. Comcast Cable Communs., Inc.*, 182 F.3d 851, 854 (11th Cir. 1999) (noting "a substantial amount of confusion" regarding complete preemption doctrine).

"Courts of appeals differ in their willingness to extend the scope of the complete preemption doctrine." *Strong v. Telectronics Pacing Sys.*, 78 F.3d 256, 259 n.1 (6th Cir. 1996). *Compare Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 n.5 (2d Cir. 2003) (holding that Securities Litigation Uniform Standards Act of 1998 triggers complete preemption); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128 (9th Cir. 2002) (same); *Darcangelo v. Verizon Communs., Inc.*, 292 F.3d 181, 187 (4th Cir. 2002) (ERISA completely preempts some state-law claims but not others); *Rosciszewski v. Arete Assocs.*, 1 F.3d 225 (4th Cir 1993) (holding complete preemption applies to § 301 of the Copyright Act); *Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir.) (holding complete preemption applies to § 105(a)(1) of the Airline Deregulation Act), *cert. denied*, 498 U.S. 926 (1990); with *Hurt v. Dow Chem. Co.*, 963 F.2d 1142 (8th Cir. 1992) (refusing to extend complete preemption to the Federal Insecticide, Fungicide, and Rodenticide Act); *Robinson v. Michigan Consol. Gas Co.*, 918 F.2d 579 (6th Cir. 1990) (refusing to extend complete preemption to suits against trustees in bankruptcy); *Circle Redmont, Inc. v. Mercer Transp. Co.*, 78 F. Supp. 2d 1316, 1319 (M.D. Fla. 1999) ("Because the Carmack Amendment's language and history do not manifest an intent to make state law claims removable as Carmack claims, the complete preemption doctrine does not apply to give this Court jurisdiction."); *Ben & Jerry's Homemade, Inc. v. KLLM, Inc.*, 58

F. Supp. 2d 315, 318 (D. Vt. 1999) ("Congress has not clearly manifested an intent to make any action involving carrier liability removable to federal court.").

The complete preemption doctrine presents important and recurring questions of federal law. This case presents an ideal vehicle for further clarification of the doctrine.

C. Under the Proper Legal Test, The LHWCA Triggers Complete Preemption.

1. The Text and Structure of the LHWCA

This Court's review is necessary to make clear that the LHWCA creates federal question jurisdiction under the proper conception of the complete preemption doctrine. The text of the LHWCA demonstrates that Congress created a comprehensive statutory scheme and did not intend to permit state-court suits for damages against stevedore employers. Indeed, the LHWCA is, if anything, broader and more comprehensive than other statutes to which this Court has applied the complete preemption doctrine. Section 301 of the LMRA, for example, merely places jurisdiction of labor disputes in the federal district courts. The LHWCA, on the other hand, contains an exclusive remedy section, which provides that the liability of an employer under the Act "shall be exclusive and in place of all other liability" to the employee and "anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." § 905(a). This Court has long recognized that "[t]he liability of an employer under the Act is exclusive." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944). The LHWCA "provides scheduled compensation (*and the exclusive remedy*) for injury to a broad range of land-based maritime workers." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995) (emphasis added); *see also South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 256 (1940) ("For those employees who are entitled to compensation, the remedy under the Act is exclusive."), *overruled on other grounds by McDermott Int'l, Inc. v.*

Wilander, 498 U.S. 337 (1991).

In addition to Section 5, the structure of the LHWCA itself confirms that it completely displaces state law. The LHWCA was established as a uniform national program of workers compensation benefits for longshore and harbor workers. The Act utterly controls the sum total of rights and obligations of insurers, employers and employees. The sheer comprehensiveness of the federal regulatory scheme confirms congressional intent to preempt state-law tort remedies and to prevent state courts from adjudicating LHWCA benefits and coverage issues in potentially inconsistent fashion. Accordingly, under this Court's precedents, the LHWCA plainly creates federal question jurisdiction under the complete preemption doctrine.

The self-executing nature of the LHWCA provides further evidence that Congress did not intend for state courts to make determinations of LHWCA benefits and coverage. Unlike some workers compensation statutes that require repeated court enforcement, the LHWCA is almost self-policing. The LHWCA provides for automatic payment of benefits and imposes penalties for an employer's failure to pay benefits. 33 U.S.C. §§ 914, 938. The Secretary of Labor has promulgated detailed regulations governing every portion of the Act. *See* 20 C.F.R. §§ 701-704 Disputes as to compensation awards are to be resolved by the Benefits Review Board, with appeals exclusively to the United States Courts of Appeals. It is difficult to imagine a more comprehensive scheme of federal regulation than the LHWCA. The Act leaves no room for state-court involvement.

2. The Legislative History of the LHWCA

The legislative history of the LHWCA confirms that state courts have no role in the statutory scheme. The legislative history repeatedly makes plain congressional intent that longshore workers should be covered by an exclusive workers' compensation scheme and *not* be permitted to file state-court tort

suits against stevedore employers.

Initially, judicial decisions extended protection to longshore workers by allowing them to sue in admiralty. *See Atlantic Transportation Co. v. Imbrovek*, 234 U.S. 52 (1914). This development opened the door for inclusion of longshore workers under the remedies of the Jones Act, 46 U.S.C. § 688. *See International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). As a result, courts excluded longshore workers from state workers' compensation systems. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

Congress reacted by making clear that longshore workers should be limited to administrative compensation remedies and should not be permitted to pursue tort claims under admiralty law. Congress twice tried unsuccessfully to bring longshore workers within state workers' compensation plans, but the courts held these attempts to be unconstitutional. *See Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924). Determined to provide administrative rather than tort remedies for longshore workers, Congress enacted the original Longshoremen's and Harbor Workers' Compensation Act. Act of March 4, 1927, Pub.L. No. 69-803, codified at 33 U.S.C. § 901 *et seq*. Congress provided that the Act was the sole remedy of the longshore worker against an employer and abolished the Jones Act recovery granted to the longshore worker against the employer by *International Stevedoring Co. v. Haverty, supra. See Swanson v. Marra Brothers, Inc.*, 328 U.S. 1 (1946).

At first, the Act allowed a longshore worker to retain an admiralty action against the vessel (rather than employer). Act of March 4, 1927, Pub.L. No. 69-803, § 33, 44 Stat. 1440. *See Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (holding that longshore workers were entitled to the protection of the judicially created warranty of "seaworthiness"). Gradually, the "seaworthiness" doctrine approached strict liability. *See* H.R.

Rep. No. 92-1441, 92d Cong., 2 Sess. 4-5 (1972); S. Rep. No. 92-1125, 92d Cong., 2d Sess. 8-9 (1972), 1972 U.S. Code Cong. & Admin. News, p. 4698.

However, the availability of an employee's admiralty action *against the vessel* began to threaten the exclusiveness of the Act's remedy *against the employer* because the vessel could pursue a third-party claim against the employer alleging that any injury by the employee was due to the negligence of the stevedoring company and that the stevedoring company had therefore breached its implied warranty of workmanlike performance. In *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), this Court held that such a triangular suit did not violate the exclusive liability provision of Section 5, even though it allowed the longshore worker to recover indirectly from the employer more than could be recovered directly through a workers' compensation claim.

In response, in 1972 Congress enacted important reforms to the LHWCA, in order to reaffirm the exclusiveness nature of the employee's administrative remedy against the employer. See *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-62 (1977) (amendments were chiefly for the purpose of strengthening the exclusivity of LHWCA remedies). Congress specifically abolished the seaworthiness standard and eliminated indemnity suits brought against stevedore employers by vessels under *Ryan* and *Sieracki*. Act of October 27, 1972, Pub.L. No. 92-576, § 18, 86 Stat. 1263, amending 33 U.S.C. § 901 *et seq*.

Congress' stated purpose was to remove litigation against employers from the courts. The House Committee Report, for example, expressed concern that judicial interpretations of the Act had led to third-party suits against employers:

> The Committee heard testimony that the number of third-party actions brought under the *Sieracki* and Ryan line of decisions has increased substantially in recent years and that much of the financial resources which

> could better be utilized to pay improved compensation benefits were now being spent to defray litigation costs.

H.R.Rep. No. 92-1441 92d Cong., 2d Sess. 5 (1972), U.S.Code Cong. & Admin. News, p. 4702.

The Senate Report concurred. *See* S. Rep. No. 92-1125, 92d Cong., 2d Sess. 9 (1972) ("The end result is that, despite the provision in the Act which limits an employer's liability to the compensation and medical benefits provided in the Act, a stevedore-employer is indirectly liable for damages to an injured longshoreman who utilizes the technique of suing the vessel under the unseaworthiness doctrine."). The Senate Report added:

> The social costs of these law suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.

Id. at 4. Congress therefore prohibited longshore workers from bringing claims against vessels under the warranty of seaworthiness allowed by *Sieracki* and relieved stevedoring companies of liability from *Ryan*-type indemnity suits brought by vessels. A vessel's liability to longshore workers was limited to cases where its negligence could be proved.

Further, Congress made clear that the negligence remedy against vessels would not disrupt the uniformity of the statutory scheme. The House Report explained that "the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 8 (1972); *see also* S. Rep. No. 92-1125, 92d Cong., 2d Sess. 12 (1972), U.S. Code Cong. & Admin. News, p. 4705. Congress thus quite deliberately opted to create a *uniform* national system – one that would be substantially disrupted if individual state courts and juries were

free to determine issues of coverage and to interpret for themselves the LHWCA's exclusive remedies provision.

In short, in 1972 Congress went to considerable lengths to prevent the circumvention of the LHWCA's exclusive remedy by means of *indirect*, third-party suits against stevedore employers. Congress enacted amendments to override judicial decisions that created the spectre of unwarranted litigation against employers. It is simply unthinkable that Congress meant to permit *direct* state-law tort lawsuits by employees against stevedore employers in state court, for such *direct* actions would blatantly obliterate the exclusive remedy provision of the LHWCA, in a manner much more threatening than the seaworthiness and third-party indemnity suits that Congress barred in 1972.

D. The Decision Below Threatens a Substantial Disruption of the LHWCA Statutory Scheme.

This Court's review is urgently needed because this case presents an important question of federal law that should be settled by this Court. *See* Rule 10(c). The rule followed in this case, if left undisturbed, would threaten substantial disruption of the statutory scheme enacted by Congress in the LHWCA. If state-court tort suits against stevedore employers were permitted, then state-court judges and potentially state-court *juries* would be able to decide questions of LHWCA benefits and coverage. Different state courts could arrive at different results, subject only to review by this Court via its discretionary certiorari jurisdiction. Absent corrective action by this Court, it is clear that stevedore employers will face a flood of state-court tort lawsuits seeking enormous damage awards in plain violation of the statutory command of the LHWCA. As this case illustrates, employees will forum shop and will file suit in state courts notorious for their anti-defendant biases and large damages awards. It is no accident that this case was filed in state court in Orleans Parish, Louisiana. That forum has been repeatedly identified as one of the top fourteen "judicial hellholes" in the

United States by the American Tort Reform Association.[2]

Recognition of state-law claims would inject numerous potentially conflicting standards into an otherwise uniform national system. For example, in this case, respondent's state-court lawsuit seeks numerous forms of damages inconsistent with the LHWCA, including damages for physical and mental pain and suffering, fear of dying, loss of enjoyment of life, loss of consortium, loss of spousal affection, and "anguish and grief." By contrast, the compensation available under the LHWCA is computed according to the employee's weekly wages. *See* 33 U.S.C. §§ 908-09, 910. The LHWCA "operates like ordinary workmen's compensation and operates on a percentage of the earnings of an individual rather than reimbursing him for his actual injury, and puts a lid on his recovery." 118 Cong. Rec. 36383 (1972) (remarks of Rep. Eckhardt).

Injecting state courts into the LHWCA would be utterly foreign to the congressional design of the statute. Congress created a centralized scheme administered by the Secretary of Labor through the Director of Office of Workers' Compensation Programs, with review by the Benefits Review Board, and appeals to the United States Courts of Appeals. The clear purpose of this administrative scheme is to provide uniformity and predictability to employers and employees alike. The rule followed in this case will destroy the uniformity and predictability at the heart of the LHWCA.

The exclusivity provision of Section 5 is a vital part of the LHWCA. "[T]he Act was not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other.

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[2] *See* American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES 2 (2002); American Tort Reform Association, BRINGING JUSTICE TO JUDICIAL HELLHOLES 8 (2003).

Employers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, United States Dep't of Labor*, 461 U.S. 624, 635 (1983) (citing H. R. Rep. No. 1767, 69th Cong., 2d Sess., 19-20 (1927)).

The rule followed in this case would upset the balance struck by Congress and would render the broad preemptive effect of Section 5 a virtual nullity. An important purpose of the LHWCA is to "provide employers with definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 281 (1980). "The use of a schedule of fixed benefits as an exclusive remedy in certain cases is consistent with the employees' interest in receiving a prompt and certain recovery for their industrial injuries as well as with the employers' interest in having their contingent liabilities identified as precisely and as early as possible." *Id.* at 282.

Accordingly, the rule followed by the decisions below would substantially disrupt the LHWCA's statutory scheme. This Court's review is urgently needed on this important question of federal law.

E. Section 1447(d) Does Not Preclude Review.

Section 1447(d) of Title 28 provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d). Respondent's opposition to the petition for writ of mandamus in the Fifth Circuit cited § 1447(d) only in passing, and the Fifth Circuit's order did not mention that statutory provision at all. Pet. App. 1a. Nonetheless, even if the Fifth Circuit had expressly relied upon § 1447(d), it would not bar

review, for the reasons stated by this Court in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976):

> [W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. . . . Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).

Id. at 351. The district court's remand order in this case was contrary to the LHWCA and therefore is not immunized from review under *Thermtron*.

Thus, in *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998), the Fourth Circuit held that § 1447(d) did not bar review of the LHWCA issue in the context of a district court remand order. The Fourth Circuit recognized that the LHWCA coverage question was an antecedent issue within the power of the court of appeals to resolve, because leaving the case in the state courts was precisely the harm that Congress was trying to avoid in the statutory scheme:

> If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d), then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals. Thus, because the coverage question of the LHWCA is a conceptual antecedent for

> the district court's remand order, it would appear that we are not prohibited by § 1447(d) from reviewing that order.

Id. at 167. "To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in *Thermtron* for exercise of the writ." *Id.* at 167-68. *See also Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004) (finding Section 1447(d) no bar to appellate review because the "specific substantive decision in securities litigation must be made by the federal rather than the state judiciary", and "if the remand is deemed non-appealable, then a major substantive issue in the case will escape review"); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 844 (3d Cir. 1991), *cert. denied,* 503 U.S. 906 (1992) (district court remand order based on constitutionality of statute was not the kind of remand order meant to be insulated by § 1447(d)); *Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990) ("the instant remand order is reviewable by mandamus, since issuance of a remand order at this point in the proceedings was entirely outside the district court's statutory authority" as expressed in the Westfall Act). If anything, any conflict between the Fifth Circuit and other courts of appeals on the issue of Section 1447(d) would provide a further reason to grant certiorari in this case.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

Respectfully submitted.

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APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30679

IN RE SSA GULF TERMINALS, INC.

Petitioners,

Petition for Writ of Mandamus to the United States
District Court for
the Eastern District of Louisiana, New Orleans

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

/s/

DATED: July 22, 2004

Appendix B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

EUNICE HERNANDEZ

V.

TODD SHIPYARDS CORPORATION, ET AL.

Civil Action No. 04-1629 Section: I/1

ORDER AND REASONS

Before the Court is a motion, filed on behalf of plaintiff, Eunice Hernandez, to remand this action to the Orleans Parish Civil District Court on the ground that federal question jurisdiction does not exist.[1] Additionally, plaintiff moves the Court to award costs and expenses incurred as a result of the removal. Defendants, SSA Gulf Terminals, Inc. and P&O Ports Gulfport, Inc., oppose the motions. For the following reasons, plaintiff's motion to remand is GRANTED. Plaintiff's motion for costs and expenses is DENIED.

BACKGROUND

On May 18, 2004, plaintiff filed this action in the Orleans Parish Civil District Court, individually and on behalf of her deceased husband, alleging only state law claims against her husband's former employers and other defendants arising from her husband's on-the-job exposure to asbestos and his death from malignant mesothelioma.[2] Defendants removed the action

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[1] Rec. Doc. No. 12.

[2] See Rec. Doc. No. 1, Pl. Petition.

asserting that plaintiff's state law claims were preempted by the Longshore Harbor Workers Compensation Act, 33 U.S.C. § 901, et seq. ("LHWCA").[3] Defendants assert that because the LHWCA is plaintiff's sole and exclusive remedy, this Court has original federal question jurisdiction pursuant to 28 U.S.C. § 1331 and, therefore, this action is removable pursuant to 28 U.S.C. § 1441.[4]

The sole question raised by plaintiff's motion is whether the LHWCA completely preempts plaintiff's state law causes of action such that this Court has federal question jurisdiction over this action.

LAW AND ANALYSIS

I. *The Well-Pleaded Complaint Rule*

As the United States Supreme Court has explained:

> A civil action filed in a state court may be removed to federal court if the claim is one "arising under" federal law. § 1441(b). To determine whether the claim arises under federal law, we examine the "well pleaded" allegations of the complaint and ignore potential defenses: "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States." *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126 (1908); see *Taylor v. Anderson*, 234 U.S. 74, 34 S. Ct. 724, 58 L. Ed. 1218 (1914). Thus, a defense that relies on the preclusive effect

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[3] *Id*, Notice of Removal, at ¶ 3.

[4] *Id.* at ¶ 4.

> of a prior federal judgment, *Rivet v. Regions Bank of La.*, 522 U.S. 470, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998), or the pre-emptive effect of a federal statute, *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983), will not provide a basis for removal. As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.

Beneficial Nat Bank v. Anderson, 539 U.S. 1, 6, 123 S. Ct. 2058,2062, 156 L. Ed. 2d 1 (2003).[5]

A defendant may not remove a case on the basis of an anticipated or even inevitable federal defense, but instead must show that a federal right is "an element, and an essential one, of the plaintiff's cause of action." *Gully v. First Nat'l Bank*, 299 U.S. 109, 111, 57 S. Ct. 96, 97, 81 L. Ed. 70(1936).[6] The well-pleaded complaint rule precludes federal question jurisdiction even when "both parties admit that the only question for decision is raised by a federal preemption defense." *Franchise Tax Bd. fo State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 12, 103 S. Ct. 2841,2848,77 L. Ed. 2d 420(1983).

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[5] Neither party contends that diversity jurisdiction exists in this case.

[6] The well-pleaded complaint rule applies with equal force to the original jurisdiction of the district courts pursuant to 28 U.S.C. § 1331 and cases removed from federal court pursuant to 28 U.S.C. § 1441(b). *See Chuska Energy Co. v. Mobil Exploration & Producing North America, Inc.*, 854 F.2d 727, 730 (5th Cir. 1988)(citing *Franchise Tax Board*, 463 U.S. at 12, n. 9, 103 S. Ct. at 2847 n. 9). "Section 1441 of the Judicial Code keys the propriety of removal to the original jurisdiction of the federal district courts. Removal under section 1441(b), the basis of removal here, is appropriate only for those claims within the federal question jurisdiction of the district courts, that is, for those actions 'arising under the Constitution, laws, or treaties of the United States.'" *Carpenter v Wichita Falls Independent School Dist.*, 44 F.3d 362, 366 (5th Cir. 1995)(quoting 28 U.S.C. § 1331).

"A corollary to the well-pleaded complaint doctrine 'is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.'" *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir. 2000) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987)). "'Complete preemption,' which creates federal removal jurisdiction, differs from more common 'ordinary preemption' ... which does not." *Id.* Complete preemption is a narrow exception to the well-pleaded complaint rule and exists only where, the federal statute "so forcibly and completely displaces state law that the plaintiff's cause of action is either wholly federal or nothing at all." *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 773 (5th Cir. 2003)(citing *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995))(alteration in original); *see also Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*, 390 U.S. 557, 559, 88 S. Ct. 1235, 1237, 20 L. Ed. 2d 126 (1968).[7] "In sum, to establish federal question jurisdiction through the invocation of a federal preemption defense, the defendant must demonstrate that Congress intended not just to 'preempt a state law to some degree,' but to altogether substitute 'a federal cause of action for a state cause of action.'" *Hart v. Bayer Corp.*, 199 F.3d 239, 244 (5th Cir. 2000)(quoting *Schmeling v. NORDAM*, 97 F.3d 1336, 1341 (10th Cir.1996)).

In order to demonstrate complete preemption over a plaintiff's otherwise purely state law claims, a defendant must show (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal

---

[7] Another exception to the well-pleaded complaint rule, not relevant here, exists where Congress has expressly provided for removal of actions governed by the federal statute in question. *See Beneficial*, 539 U.S. at 7, 123 S. Ct. at 2062 (describing the unusual preemption provision of the Price-Anderson Act that provides for removal of tort actions arising out of nuclear accidents even when the state court complaint asserts only state law claims).

courts for enforcement of the right; and (3) there is a clear Congressional intent that the federal cause of action be exclusive. *Hoskins*, 343 F.3d at 775-76 (modifying the third prong of the complete preemption analysis set forth in *Baylor Univ.*, 214 F.3d at 632). In undertaking this analysis, "it is the cause of action, and not a remedy, that must be preempted." *Carpenter*, 44 F.3d at 367 n.2.

Notwithstanding circuit precedent holding that the LHWCA "does not create federal subject matter jurisdiction supporting removal," *Garcia v. Amfels, Inc.*, 254 F.3d 585, 588 (5th Cir. 2001); *see also Aaron v. Nat'l Union Fire Ins. Co of Pittsburgh, Pa.*, 876 F.2d 1157 (5th Cir. 1989), defendants argue that the analysis used in those cases was "expressly overruled" by the United States Supreme Court in *Beneficial Nat'l Bank v Anderson*, 539 U.S. 1, 156 L. Ed. 2d 1, 123 S. Ct. 2058 (2003), and "abandoned" by the Fifth Circuit in *Hoskins v. Bekins Van Lines.*, 343 F.3d 769 (5th Cir. 2003).

In *Hoskins*, the Fifth Circuit explained the effect of the *Beneficial* decision as follows:

> Under this Court's precedent, in order to demonstrate complete preemption over a plaintiff's otherwise purely state law claims, the defendant must show the following:
>
> > (1) the statute contains a civil enforcement provision that creates a cause of action that both replaces and protects the analogous area of state law; (2) there is a specific jurisdictional grant to the federal courts for enforcement of the right; and (3) there is a clear Congressional intent that claims brought under the federal law be removable.
>
> *Johnson v. Baylor Univ.*, 214 F.3d 630, 632 (5th Cir.2000) (quoting *Heimann v. Nat. Elevator Ind. Pension Fund*, 187 F.3d 493, 500 (5th Cir. 1999)) (emphasis

added). In *Beers*, we found no clearly manifested Congressional intent that state law claims for loss or damage to goods during an interstate shipment by a common carrier be removable – in other words, the third element of the complete preemption analysis was lacking. Similarly, in *Beneficial* the respondents argued before the Supreme Court that the requisite Congressional intent to make state usury claims against national banks removable was lacking in the National Bank Act ... The Supreme Court explained that:

> Because *the proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable*, the fact that these sections of the National Bank Act were passed in 1864, 11 years prior to the passage of the statute authorizing removal, is irrelevant,...

Id. at 2064 n. 5. We view *Beneficial* as evidencing a shift in focus from Congress's intent that the claim be removable, to Congress's intent that the federal action be *exclusive*.

This Court's holding in *Beers* rested on its finding that "no manifest congressional intent, of the type contemplated in *[Metropolitan Life v.] Taylor*, to make this state claim removable to federal court" existed. *Beers v. North American Van Lines, Inc.*, 836 F.2d at 913 n. 3. Prior to *Beneficial*, this finding would have ended our inquiry. Now, however, we must instead determine whether Congress intended the Carmack Amendment to provide the exclusive cause of action for claims arising out of the interstate transportation of goods by a common carrier. *See Beneficial*, 123 S. Ct. at 2067 ("The analysis in today's opinion implicitly contradicts (by rendering

> inexplicable) Taylor's discussion of pre-emption and removal.") (Scalia, J., dissenting).

Hoskins, 343 F.3d at 775-776. Accordingly, although the Court agrees with defendants that the Beneficial decision, as applied by the Fifth Circuit in *Hoskins*, modified the third prong of the Fifth Circuit's test for analyzing complete preemption, i.e., the prong focused on congressional intent, the *Hoskins* Court did not explicitly or implicitly hold that *Beneficial* effected any change to the first two prongs of the analysis.

The defendants focus their argument on whether the third prong of the Fifth Circuit's complete preemption test is satisfied, i.e., whether the LHWCA evinces a congressional intent to provide the exclusive cause of action for claims by a stevedore against his employers. However, the Court need not and does not reach that issue because defendants cannot satisfy the first two prongs of the compete preemption analysis. In *Aaron*, the Fifth Circuit applied the well-pleaded complaint rule and held that the LHWCA did not provide a basis for removal of a plaintiff's purely state law claims. 876 F.2d at 1166. The Court noted that when the exclusive remedial provisions of the LHWCA are raised by a defendant in response to a plaintiff's purely state law claims, the LHWCA "is nothing more than a statutory defense to a state-court cause of action - the classic circumstance of non-removability." *Id.*

Relevant to the first two prongs of the Fifth Circuit's complete preemption analysis, the *Aaron* court specifically found that (1) the LHWCA contains no civil enforcement provision that creates a federal cause of action that could be litigated in either federal or state court; and (2) the LHWCA does not contain a specific jurisdictional grant to the federal courts for the enforcement of a right created by the LHWCA. *See id.* at 1164-65. Contrary to defendants' assertion, the *Aaron* court did not rest its decision solely on an analysis of congressional intent to make claims pursuant to the LHWCA removable to federal

court. Therefore, even if some portion of the *Aaron* decision pertaining to congressional intent to make LHWCA claims removable is arguably undermined by *Hoskins*, a question on which this Court expresses no opinion, the *Aaron* court's statements bearing on the first two prongs of the complete preemption analysis remain binding on this Court and preclude removal of this action.

The other Fifth Circuit cases cited by defendants do not support its claim that the LHWCA provides a basis for federal question jurisdiction. Citing the panel decision in *Texas Employers' Insurance Assoc. v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), defendants contend that the Fifth Circuit has held that the preemptive force of the LHWCA creates federal question jurisdiction. However, as the Aaron court noted, the en banc court subsequently vacated the Texas Employers' panel decision and then pretermitted the jurisdictional question. Aaron, 876 F.2d at 1166 n.16. Therefore, the *Texas Employers'* decision is no longer binding circuit precedent. *Id.* The defendants' reliance on *Atkinson v. Gates, McDonald & Co.*, 838 F.2d 808 (5th Cir. 1988), is also misplaced. In *Garcia*, the Fifth Circuit unequivocally stated that Atkinson did not undermine Aaron because it did not address the same issue, i.e., whether the LHWCA provided a basis for federal jurisdiction when raised as a defense. 254 F.3d at 587.

Accordingly, because the LHWCA has been raised as a defense to plaintiff's state law causes of action and because defendants cannot demonstrate that the LHWCA satisfies the Fifth Circuit's three-prong complete preemption analysis as modified in Hoskins, this Court does not have subject matter jurisdiction over this action. "The LHWCA is a preemption defense that needs to be raised in state court." *Garcia*, 254 F.3d at 588.

II. *Motion for Costs and Expenses*

28 U.S.C. § 1447(c) authorizes the Court to "require payment

of just costs and any actual expenses, including attorney fees incurred as a result of removal." In applying § 1447(c), "the matter is left to the court's discretion, to be exercised based on the nature of the removal and the nature of the remand." *Garcia*, 254 F.3d at 587 n.2 (citing David D. Siegel, Commentary on 1988 Revision to 28 U.S.C. § 1447 (West Supp. 1993)).

In *Garcia*, the Fifth Circuit affirmed an award of costs and fees imposed by the district court on the ground that removal based upon the LHWCA was frivolous. 254 F.3d at 587. The Fifth Circuit noted that the defendant was "unable to city any Fifth Circuit case, nor any persuasive authority from another circuit, supporting removal." Id. at 588. Accordingly, the Fifth Circuit found that the district court did not abuse its discretion by imposing costs and fees upon the defendant because, in 2001, there was "no question that the LHWCA does not create federal subject matter jurisdiction supporting removal." *Id.*

Although the Court ultimately disagrees with defendants' broad reading of the *Beneficial* and *Hoskins* decisions and their effect on existing Fifth Circuit precedent, the Court concludes that defendants removal of this action was neither frivolous or without legal support. The defendants removed this action based upon a bona fide change in the Fifth Circuit's preemption analysis. Relying on their understanding of the change in the law, defendants supported their argument with numerous citations to caselaw discussing the exclusivity of the remedial scheme set forth in the LHWCA. Additionally, plaintiff concedes that the effect of *Beneficial* and *Hoskins* on Fifth Circuit cases involving the removal of cases based upon the preemptive force of the LHWCA has not heretofore been addressed by any published decision. Considering all of these factors, the Court finds that this is not an appropriate case in which to exercise its discretion to award costs and fees incurred as a result of defendant's decision to remove this action.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff, Eunice Hernandez, to remand this action to the Orleans Parish Civil District Court is GRANTED and, pursuant to 28 U.S.C. § 1447(c), this action is REMANDED to the Orleans Parish Civil District Court for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that plaintiff's motion for costs and expenses pursuant to 28 U.S.C. § 1447(c) is DENIED.

New Orleans, Louisiana, July 7, 2004.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
OCT 12 2004
OFFICE OF THE CLERK

No. 04-327

In The

Supreme Court of the United States

SSA GULF, INC.,

Petitioner,

v.

EUNICE HERNANDEZ, INDIVIDUALLY AND ON BEHALF OF DECEDENT, JOSEPH HERNANDEZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

EUNICE HERNANDEZ'S BRIEF IN OPPOSITION

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INTRODUCTION

Plaintiff/Respondent, Eunice Hernandez, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by defendant, SSA Gulf, Inc. ("SSA Gulf"). Respectfully, the petition should be denied.

The district court remanded the case under 28 U.S.C. §1447(c) due to a lack of subject matter jurisdiction. As a result, 28 U.S.C. §1447(d) prohibited appellate review of the remand order. Nevertheless, SSA Gulf petitioned the United States Fifth Circuit Court of Appeals for a writ of mandamus, seeking review of the remand decision. Given the lack of appellate jurisdiction, the Fifth Circuit properly rejected defendant's request for mandamus relief.

Moreover, the petition for writ of certiorari should be denied because the remand ruling is in harmony with the case law, and no inter-circuit conflict exists. The district court correctly concluded the Longshore Harbor Workers' Compensation Act ("LHWCA") does not give rise to complete preemption. Petitioner fails to cite a case which has reached the opposite conclusion.

STATEMENT OF THE CASE

I. SUIT IS FILED IN STATE COURT.

This case involves the asbestos-related disease and death of Joseph "Frenchy" Hernandez, the respondent's husband. Mr. Hernandez was employed by SSA Gulf from 1964 to 1969 and from 1971 to 1972. Plaintiff-respondent alleges that Mr. Hernandez was substantially exposed to asbestos during his employment with SSA Gulf.

Ms. Hernandez filed suit in state court and alleged state-law causes of action against a number of defendants, including SSA Gulf. The Petition for Damages does not mention the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. §901 *et seq.*, nor any other federal statute, regulation, or law.

II. THE FEDERAL COURT PROCEEDINGS.

A.

SSA Gulf removed the case on the basis of federal question jurisdiction, asserting plaintiff's claims were completely preempted by the LHWCA. No other basis for removal was alleged.

Ms. Hernandez moved to remand because the Fifth Circuit had repeatedly concluded that the LHWCA does not give rise to complete preemption. In the lead case, *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), the Fifth Circuit analyzed whether the LHWCA completely preempted state law. The court found that "the LHWCA is . . . nothing more than a statutory defense to a state-court cause of action – the classic circumstance of non-removability." *Id.* at 1166. The Court of Appeals reached the same conclusion, twelve years later, in *Garcia v. Amfels, Inc.*, 254 F.3d 585, 588 (5th Cir. 2001).

SSA Gulf responded that *Beneficial Nat'l Bank v. Anderson*[1] changed the test for complete preemption and,

[1] 539 U.S. 1, 123 S. Ct. 2058, 156 L.Ed.2d 1 (2003). SSA Gulf also cited *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 159 L.Ed.2d 312 (2004) in support of removal. For the reasons discussed in the district court's order, *Aetna* does not implicitly overrule *Aaron* and its progeny.

consequently, *Aaron* and *Garcia* were no longer good law. SSA Gulf asked the district court to ignore these cases and find that removal was proper under the LHWCA.

B.

The trial court rejected SSA Gulf's arguments and granted plaintiff's motion to remand. Based on *Hoskins v. Bekins Van Lines,*[2] the court concluded that *Beneficial* changed the third prong of the Fifth Circuit's complete-preemption test, but did not change the first two prongs of the test. Petition for Writ of Certiorari, Appx. B at 8a. As a result, *Aaron* (which found the LHWCA failed to satisfy all three prongs of the test) remained good law, and remand was appropriate due to a lack of subject matter jurisdiction. *Id.* at 9a.

SSA Gulf subsequently filed a Petition for Writ of Mandamus in the Fifth Circuit, seeking review of the remand order. SSA Gulf did not meaningfully address whether the Court of Appeals enjoyed appellate jurisdiction in light of §1447(d). Plaintiff-respondent, therefore, filed an opposition to the petition for mandamus, raising this jurisdictional defect. Shortly thereafter, the Fifth Circuit denied the petition. *See* SSA Gulf's Petition for Writ of Certiorari, Appx. A.

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[2] 343 F.3d 769 (5th Cir. 2003).

REASONS FOR DENYING THE WRIT

The case is not appropriate for Supreme Court review for the reasons discussed below.

I. THE FIFTH CIRCUIT PROPERLY DENIED THE PETITION FOR MANDAMUS.

There is no doubt the Fifth Circuit properly denied SSA Gulf's petition for mandamus. The district court remanded the case due to a lack of jurisdiction under §1447(c); consequently, §1447(d) prohibited review of the remand decision.

A. Section 1447(d) And The Applicable Jurisprudence.

28 U.S.C. §1447(d) prohibits review of remand orders based on a lack of subject matter jurisdiction. The statute provides in pertinent part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal **or otherwise**. . . . " (Emphasis added). As set forth below, Congress barred review of remand orders whether by appeal **or** mandamus proceedings.

1.

The "[r]eviewability of a remand order depends entirely upon the trial court's stated grounds for its decision to remand." *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir.), *cert. denied*, 502 U.S. 859

(1991).[3] The trial court brings "its remand order within the absolute immunity from review of 28 U.S.C. §1447(d) by expressly referring to a lack of jurisdiction as one of the bases of its decision to remand." *Id.* at 1024. Thus, a remand based on §1447(c) for lack of subject matter jurisdiction cannot be appealed. *See Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 127 (1995); *Copling v. Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999).

Similarly, a remand order based on a lack of subject matter jurisdiction is not reviewable by mandamus proceedings. In *Thermtron Products, Inc. v. Hermansdorfer*, 432 U.S. 336 (1976), this Honorable Court indicated §1447(d) "prohibits review of all remand orders issued pursuant to §1447(c) whether erroneous or not and whether review is sought by appeal **or by extraordinary writ**." (Emphasis added).

The Fifth Circuit recently held that a remand order based on a lack of subject matter jurisdiction is not reviewable by a writ of mandamus. In *Victor v. Grand Casino-Coushatta*, 359 F.3d 782, 784 (5th Cir. 2004), the Court of Appeals stated: "Appellate courts are precluded from reviewing remand orders issued pursuant to §1447(c), by appeal, **mandamus**, or otherwise." (Emphasis added) (quotations omitted).

2.

A remand order based on §1447(c) is not reviewable even if the decision was plainly erroneous. *See Thermtron,*

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[3] *See also Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000), *cert. denied*, 533 U.S. 915 (2001).

432 U.S. at 351; *Heaton*, 231 F.3d at 997. The purpose of this blanket prohibition against appellate review of §1447(c) remand orders is to prevent delay through protracted litigation of jurisdictional issues. *See Thermtron*, 432 U.S. at 351.

B. The Trial Court's Order Granting Remand Was Expressly Based On §1447(c) And Therefore Cannot Be Reviewed Under §1447(d).

The district court expressly and unequivocally stated in its order that remand was "pursuant to 28 U.S.C. §1447(c)" due to a lack of subject matter jurisdiction. Petition, Appx. B at 11a. As a result, the Fifth Circuit lacked appellate jurisdiction over the petition for writ of mandamus under §1447(d) and properly denied such relief. This would have been true even if the district court had plainly erred (which it did not) in granting the remand. *See Thermtron*, 432 U.S. at 351; *Copling*, 174 F.3d at 596.

C. Petitioner's Arguments Regarding Appellate Jurisdiction Are Misplaced.

1.

Petitioner primarily relies on two cases to support its claim that appellate jurisdiction exists here. The first is *Thermtron*. Taking a quote out of context, SSA Gulf suggests that appellate jurisdiction exists where a court of appeals needs to correct an erroneous remand ruling. Petition at 23. *Thermtron* does not stand for this proposition. Rather, the Court made clear that appellate review

was appropriate only where a remand order was based on grounds **other than** a lack of jurisdiction.

SSA Gulf's reliance on *In re CSX Transp. v. Shives*, 151 F.3d 164 (4th Cir. 1998) is equally misplaced. There, the district court remanded the case under 28 U.S.C. §1445(a). The court found that the plaintiff was not covered by the LHWCA and, therefore, the FELA claim should not have been removed. *Id.* at 166-67. Because remand was not based on §1447(c), and because the district court's decision on the LHWCA's applicability was a predicate to its remand ruling, the Fourth Circuit reviewed the remand order. *Id.* at 166-68.

The facts here, of course, are totally different. The district court specifically remanded under §1447(c) after analyzing the complete-preemption issues. No ruling was made on whether the decedent (Mr. Hernandez) was covered by the LHWCA. Accordingly, §1447(d) prohibits review of the remand ruling herein.

2.

If the Court were to adopt the view that appellate jurisdiction exists whenever a defendant believes a remand order is in error, state court proceedings would be seriously disrupted. For example, would a state court have jurisdiction over a remanded case if the defendant appeals the remand order? Assuming the state court does have jurisdiction, should it proceed with the case while the possibility remains that the remand order will be reversed? If the state court proceeds with the case, will any of its rulings survive a subsequent reversal of the remand order?

Congress wisely minimized these issues when it enacted §1447(d) and prohibited appellate review in cases like this one.

II. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO INTER-CIRCUIT CONFLICT REQUIRING THE COURT'S ATTENTION.

Even assuming, for the sake of argument, that appellate jurisdiction exists here, the petition should be denied because there is no inter-circuit conflict necessitating the Court's intervention. The Fifth Circuit properly refused to consider SSA Gulf's petition for mandamus due to a lack of appellate jurisdiction. This decision is not in conflict with the applicable case law.

The Fifth Circuit's decision, moreover, does not conflict with the Fourth Circuit's ruling in *Shives*. Here, the only issue was whether the LHWCA gave rise to complete preemption for removal purposes. *Shives,* however, did not address the complete-preemption doctrine; instead, the court focused on whether the plaintiff was covered by the LHWCA based on the facts presented therein. *Shives*, 151 F.3d at 168-71.

III. THE PETITION SHOULD BE DENIED BECAUSE THE REMAND RULING IS CONSISTENT WITH THE COURT'S COMPLETE-PREEMPTION CASES.

The Fifth Circuit's decision to deny SSA Gulf's writ of mandamus was proper. The district court analyzed the impact of the *Beneficial* decision and correctly concluded the LHWCA does not give rise to complete preemption.

A.

The district court began its analysis with a review of the well-pleaded complaint rule, and the Fifth Circuit's test for complete preemption. Petition for Writ of Certiorari, Appx. B at 3a-6a. The court then analyzed the Fifth Circuit's decision in *Hoskins* and concluded that while *Beneficial* modified the third prong of the test (dealing with Congressional intent), it left the first two prongs unchanged. *Id.* at 6a-7a.

Having reached this conclusion, the district court found that *Aaron* remained good law. While *Beneficial* changed the third prong of the complete-preemption test, *Aaron* had not been decided solely on this factor. The LHWCA did not give rise to complete preemption because none of the three factors were met. *Id.* at 8a-9a.

B.

The district court's complete-preemption ruling is consistent with *Beneficial* for another reason. Congress did **not** intend for the LHWCA to be the plaintiff's exclusive remedy against SSA Gulf. Mr. Hernandez had a choice between Louisiana law and the LHWCA in connection with his claim for pain and suffering (the "survival claim").

Mr. Hernandez's survival claim is governed by the law in effect at the time the claim accrued. In a mesothelioma case, a claim accrues when the plaintiff is substantially

exposed to asbestos.[4] Plaintiff alleged that Mr. Hernandez was substantially exposed to asbestos prior to 1975 while working for SSA Gulf and the other defendants, and these exposures caused his mesothelioma.[5]

In this time frame, **concurrent** jurisdiction existed between the LHWCA and state workers' compensation laws. In *Sun Ship, Inc. v. Pennsylvania,*[6] the Court recognized this overlapping jurisdiction, explaining:

> [W]e are not persuaded that the bare fact that the federal and state compensation systems are different gives rise to a conflict that, from the employer's standpoint, necessitates exclusivity for each compensation system. . . . Mandating exclusive jurisdiction will *not relieve employers of their distinct obligations under state and federal compensation law*. (Emphasis added).[7]

Thus, a Louisiana plaintiff who was eligible for LHWCA benefits could instead choose to pursue state compensation benefits. The LHWCA was not the plaintiff's exclusive remedy.[8]

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[4] *See Austin v. Abney Mills Inc.*, 824 So.2d 1137, 1141 & 1151-55 (La. 2002).

[5] Petition at ¶11 & 21.

[6] 447 U.S. 715, 722, 100 S. Ct. 2432, 65 L.Ed.2d 458 (1980).

[7] *Sun Ship*, 447 U.S. at 725.

[8] Another exception to the LHWCA is for intentional torts. Here, plaintiff alleged intentional misconduct by SSA and the other stevedoring defendants, thereby allowing her to assert claims in tort, outside the LHWCA. Petition at ¶20; *Charlot v. Bethlehem Steel Corp.*, 838 F. Supp. 312, 316 (E.D. Tx. 1993) (discussing intentional tort exception).

C.

In *Poche v. Avondale Shipyards, Inc.*,[9] the Louisiana Supreme Court addressed the issue whether an injured plaintiff, who was eligible for LHWCA benefits, could choose Louisiana law, opt out of the compensation scheme, and sue in tort for his injuries. The answer was "yes": the injured worker could institute a tort action against his co-employees provided that he had not elected to pursue his remedies under the LHWCA.[10]

Based on the foregoing principles, the LHWCA was not Mr. Hernandez's exclusive remedy against SSA Gulf. When his claim accrued, concurrent jurisdiction existed between the LHWCA and Louisiana's worker's compensation scheme.[11] In the Petition, plaintiff specifically selected Louisiana law, opted out of the state compensation scheme, and alleged that SSA Gulf and the other stevedoring defendants were liable for causing Mr. Hernandez's mesothelioma.[12]

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[9] 339 So. 2d 1212 (La. 1976).

[10] *Id.* at 1220-22.

[11] Concurrent jurisdiction ended in Louisiana in 1990. That year, the Louisiana legislature amended the workers' compensation act to require a plaintiff to pursue benefits under the LHWCA if available. *See* La. Rev. Stat. 23:1035.2.

[12] Petition at ¶20. Mr. Hernandez was entitled to sue his employers directly in tort for his mesothelioma, because this disease fell outside the workers' compensation scheme prior to 1976. *Austin*, 824 So.2d 1145-46. He did not have to sue his co-employees, the alleged executive officers.

CONCLUSION

The petition for writ of certiorari should be denied. The Fifth Circuit properly denied mandamus relief given the lack of appellate jurisdiction. Moreover, there is no inter-circuit dispute on whether the LHWCA gives rise to complete preemption.

Petitioner incorrectly suggests that the district court's reliance on *Aaron* will disrupt the LHWCA statutory scheme. In the fifteen years since *Aaron* was decided, no such disruption has occurred.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 22 2004
OFFICE OF THE CLERK

No. 04-327

In the
Supreme Court of the United States

SSA GULF, INC.,

PETITIONER,

v.

EUNICE HERNANDEZ, INDIVIDUALLY AND
ON BEHALF OF DECEDENT, JOSEPH HERNANDEZ,

RESPONDENT.

On Petition For a Writ Of Certiorari To
The U.S. Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Petitioner's corporate disclosure statement was set forth at page ii of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case presents the question whether the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), wholly displaces and preempts state tort damages claims by longshore employees against their stevedore employers, so as to trigger federal question jurisdiction pursuant to 28 U.S.C. § 1331. The decision below conflicts with a holding of the Fourth Circuit, as well as with governing precedent from this Court regarding the "complete preemption" doctrine. Further, the decision below threatens a substantial disruption of the LHWCA scheme by enabling state courts – including state-court judges and *juries* – to decide questions of LHWCA benefits and coverage in inconsistent and non-uniform ways.

1. The Brief in Opposition ("BIO") only serves to underscore the need for this Court's review. The BIO argues that "Congress did **not** intend for the LHWCA to be the plaintiff's exclusive remedy against SSA Gulf. Mr. Hernandez had a choice between Louisiana law and the LHWCA in connection with his claim for pain and suffering (the 'survival claim')." BIO 9 (emphasis in original). Respondent advances a theory of "concurrent jurisdiction," under which an injured plaintiff may choose state law, "opt out of the compensation scheme, and sue in tort for his injuries." BIO 11. Respondent cites the decision of the Louisiana Supreme Court in *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), *appeal dismissed*, 434 U.S. 803 (1977), where the court expressly *rejected* the propositions that "the 1972 amendments to the [LHWCA] have the effect of preempting the power of this state to provide a compensation remedy to maritime workers injured on our soil"; that "the need for uniformity in the field of admiralty law demands that federal law operate exclusively as to covered workers"; and that "the history and wording of the [LHWCA] evidence a Congressional intent that federal law in this area be preeminent." *Id.* at 1215. The court opined: "We do not agree with any of these

contentions." *Id.*

Yet this Court has taken precisely the opposite view, squarely holding that "[t]he liability of an employer under the Act is exclusive." *Norton v. Warner Co.*, 321 U.S. 565, 571 (1944); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 261 (1979); *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106, 111-13 (1974); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952).

At least eight circuits have similarly held that Congress intended for the LHWCA to serve as the *exclusive* remedy for longshore employees against their stevedore employees. *See, e.g.*, *Stewart v. Dutra Constr. Co.*, 343 F.3d 10, 14 (1st Cir. 2003), *cert. granted*, 124 S. Ct. 1414 (2004); *Gravatt v. City of New York*, 226 F.3d 108, 111 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 938-39 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Artis v. Norfolk & Western Ry.*, 204 F.3d 141, 144 (4th Cir. 2000); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 293 (6th Cir.), *cert. denied*, 510 U.S. 813 (1993); *Johnson v. Continental Grain Co.*, 58 F.3d 1232, 1235 (8th Cir. 1995); *Sample v. Johnson*, 771 F.2d 1335, 1346-47 (9th Cir.1985), *cert. denied*, 475 U.S. 1019 (1986); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1527 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

Thus, Respondent's defense of the Fifth Circuit's judgment in this case only confirms the existence of a conflict among the lower courts on an important question of federal law. Respondent's position has been expressly repudiated by this Court and at least eight circuits. This Court's review is urgently needed.

2. Respondent seeks to distinguish the Fourth Circuit's decision in *In re CSX Transportation, Inc. v. Shives*, 151 F.3d 164 (4th Cir. 1998), on the ground that it "did not address the

complete-preemption doctrine." BIO 8. Respondent's argument is highly misleading. To be sure, the Fourth Circuit did not use the phrase "complete preemption." But it squarely held that "[t]he question of whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Id.* at 167. *That* federal principle is why the Fourth Circuit "focused on whether the plaintiff was covered by the LHWCA based on the facts presented therein." BIO 8. Under Respondent's view, the same inquiry would be conducted by a state court, not a federal court. There can be no doubt that, if Respondent's state-court complaint had been filed in the Fourth Circuit, it would have been removed to federal court and dismissed. Under the decisions below, state-court complaints filed in the Fifth Circuit, if removed to federal court, will be remanded to state court instead. There is a thus a stark circuit conflict in this case.

The Fourth Circuit opined: "If we were to dismiss this appeal as unreviewable under 28 U.S.C. § 1447(d)" – the very disposition that Respondent urges in this case – "then we would be leaving in place a remand order which would commit to the state courts the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals." 151 F.3d at 167. *Shives* is irreconcilable with the decision below.

3. Respondent's position also flies in the face of clear congressional intent and would upset the statutory balance carefully crafted by Congress. This Court has recognized that the LHWCA "was designed to strike a balance between the concerns of the longshoremen and harbor workers on the one hand, and their employers on the other." *Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, United*

States Dep't of Labor, 461 U.S. 624, 635 (1983). Vital to that balance is the principle of exclusivity that Respondent seeks to repudiate. Also vital is the need for "limited and predictable liability" (*id.*) that would be eliminated by injecting state courts into the LHWCA scheme.

This case illustrates the dangers against which Congress sought to guard. Under Respondent's view, different state courts could reach different results regarding LHWCA eligibility and benefits issues. Different state courts could adopt forms of damages inconsistent with the LHWCA's system of compensation, which is based on an employee's weekly wages. 33 U.S.C. §§ 908-10. For example, in this case Respondent seeks pain and suffering damages under state tort law that are not available under the LHWCA.

Respondent also seeks to apply the Louisiana state-court "exposure" rule for defining when an asbestos injury accrues, BIO 9-10 & n.4, which is inconsistent with the LHWCA rule that injury occurs at the time of manifestation. *See Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir. 1985) ("Congress expressly rejected the 'time of last exposure' approach to determining the date of injury and recognized that it is the disability itself, not mere exposure to a toxic substance, that should trigger an injured worker's rights under the Act."), *cert. denied*, 474 U.S. 846 (1985).

Respondent maintains that each state court can decide for itself how to administer the LHWCA. Yet Respondent's reliance on *Poche v. Avondale Shipyards, Inc.*, 339 So.2d 1212 (La. 1976), demonstrates that the matter cannot be entrusted to the state courts. Respondents' own arguments demonstrate how the decision below threatens to eviscerate the congressional aims of uniformity, predictability, and limited employer liability.

4. Respondent suggests, only in a footnote, that "[a]nother exception to the LHWCA is for intentional torts." BIO 19 n.8. But Respondent did not contend, either before the district court

or the court of appeals, that this case might qualify for that exception. Neither court mentioned the issue in its decision. As this case comes to this Court, the decisions below do not rest in any way on the intentional tort exception to the LHWCA. Accordingly, this Court need not consider the intentional tort issue. This Court should grant review, reverse the decisions below, and leave for consideration on remand whatever arguments, if any, Respondent might have preserved regarding the intentional tort exception. In any event, those arguments would be frivolous.[1]

5. Respondent offers nothing in the way of analysis regarding this Court's recent decisions revising and clarifying the complete preemption doctrine, particularly *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003), and *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004). Respondent maintains (BIO 9) that the

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[1] Respondent's state-court petition alleges only that the stevedore employers "knowingly conceal[ed]" certain information. ¶ 20. The very case cited by Respondent in fact holds that such allegations do not trigger the intentional tort exception. *See Charlot v. Bethlehem Steel Corp.*, 838 F. Supp. 312, 316 (E.D. Tex. 1993) ("The characterization of negligence as wanton or gross does not raise that negligence into intent nor does it affect the exclusiveness of the remedies provided by the compensation acts."); *see also Johnson v. ODECO Oil & Gas Co.*, 679 F. Supp. 604, 607 (E.D. La. 1987), *aff'd*, 864 F.2d 40 (5th Cir. 1989) ("Willful, wanton, and reckless misconduct is not the equivalent of an intentional tort. There must be proof of a specific intent by the employer to injure the employee."); *Austin v. Johns-Manville Sales Co.*, 508 F. Supp. 313, 317 (D. Me. 1981) ("Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, or even wilfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental character.") (internal quotation marks and citation omitted); *Houston v. Bechtel Assoc. Professional Corp.*, 522 F. Supp. 1094, 1096 (D. Va. 1981) ("Knowledge and appreciation of a risk is not the same as the 'intent' to cause injury. Neither knowingly permitting a hazardous work condition to exist, nor willfully failing to furnish a safe place to work, nor even willfully violating a safety statute, constitutes the requisite intent.").

district court below properly followed *Aaron v National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), *cert denied*, 493 U.S. 1074 (1990) (cited at Pet. App. 6a, 8a, 9a), which opined that "the preemptive force necessary to create removal jurisdiction should only be held to exist when 'Congress has clearly manifested an intent to make causes of action . . . removable to federal court.'" *Id.* at 1163 (quoting *Taylor*, 481 U.S. at 68 (Brennan, J., concurring)). But this statement of the law is plainly *incorrect* after *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5.

Respondent ignores another important change occasioned by *Beneficial Nat'l Bank* and *Aetna Health Ins.* Both recent decisions instruct that a significant factor in the complete preemption doctrine is the federal interest in preserving the uniformity of a comprehensive statutory scheme. 539 U.S. at 10-11; 124 S. Ct. at 2495. As we have shown, the same federal interest lies at the heart of the LHWCA. Accordingly, this case would be an excellent vehicle for the further clarification and refinement of the complete preemption doctrine. At a minimum, because the courts below applied an improper legal test that conflicts with governing precedent of this Court, this Court should GVR in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

6. Respondent offers 28 U.S.C. § 1447(d) as a reason to deny review. BIO 4-7. However, the Fifth Circuit did not cite that statute in its Order, Pet. App. 1a, and Respondent's brief in the Fifth Circuit addressed § 1447(d) only in passing.

In any event, § 1447(d) is no barrier to review in this case. The issue of the proper construction of the LHWCA – and whether it displaces Respondent's state-law tort remedy – is antecedent to the question of subject-matter jurisdiction. Indeed, it is separate from the issue of remand: under SSA Gulf's view, the LHWCA required that the district court enforce the exclusivity provisions of the LHWCA by dismissing the case,

not by remanding to the state court. The issue is not simply the jurisdictional question of whether Respondent's state-law tort claims should proceed in federal court or in state court; the issue is whether the tort claims may proceed *at all* in *any* court in light of the LHWCA's exclusivity provisions mandating their dismissal. *See Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934) (appellate court had power to review issue which "preceded that of remand"); *Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) (fact that district court's decision cited § 1447(c) is not sufficient to trigger § 1447(d) because "[t]he district court's conclusion that it did not have subject matter jurisdiction was premised on two antecedent decisions that are both judicially reviewable and appealable"); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir.) (review not barred where a statutory issue under 28 U.S.C. § 2679(d) was the impetus behind the remand, but was also "separate from and logically preceded the question of remand"), *cert. denied*, 510 U.S. 817 (1993); *Mitchell v. Carlson*, 896 F.2d 128, 132-33 (5th Cir. 1990) (finding issue separable and reviewable under *City of Waco*); *In re Adams*, 809 F.2d 1187, 1188-89 (5th Cir. 1987) (same regarding the dismissal of bankruptcy appeal); *Gallea v. United States*, 779 F.2d 1403, 1404 (9th Cir. 1986) (same regarding dismissal of United States in tort suit).

Section 1447(d) is not automatically triggered merely because the district court's remand order cited § 1447(c) and was purportedly based on lack of subject-matter jurisdiction. *See Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291 (11th Cir. 2000) (remand order based on lack of subject-matter jurisdiction reviewable where "the district court exceeded its authority under § 1447(c)"); *Xiong v. Minnesota*, 185 F.3d 424, 427 (8th Cir. 1999) (where district court held that it lacked subject matter jurisdiction but "case law dictated that jurisdiction was proper at the time of removal," § 1447(d) was no bar to review: "Because the district court remanded a properly removed

cause on grounds the court lacked authority to consider, the remand order is reviewable on appeal.").

Accordingly, § 1447(d) does not preclude review of the LHWCA question presented by this case. That is the import of such decisions as *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004); *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832, 844 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); and *Nasuti v. Scannell*, 906 F.2d 802, 808 (1st Cir. 1990), which were cited in the Petition at 24 but entirely ignored by Respondent.

Under Respondent's view, federal appellate courts would lack authority to protect comprehensive congressional schemes from interference by state courts. Respondent's suggestion that SSA Gulf could raise its federal claim in state court introduces the very evil that Congress aimed to prevent: having state judges and juries (rather than federal administrators and courts of appeals) resolve disputed issues under the exclusively federal LHWCA scheme. *See Powers v. Southland Corp.*, 4 F.3d 223, 229-30 (3d Cir. 1993) (holding that § 1447(d) was no bar to review because, "if there is independent appellate jurisdiction over an issue under the governing federal statutes, the fact that the district court may have remanded the case cannot deprive the court of appeals of the jurisdiction granted to it by Congress"; "the essence of the defendant federal employee's complaint was that she would be subjected to suit in state court although she had a statutory right to be immune from suit").

The Fourth Circuit recognized the same principle in *Shives*, 151 F.3d at 167. Although Respondent argues that the remand in that case was not based on § 1447(c), *see* BIO 7, nothing in the *Shives* decision turned on the statutory provision under which the remand was issued. Rather, the Fourth Circuit explained that, "because the coverage question of the LHWCA is a conceptual antecedent for the district court's remand order, it would appear that we are not prohibited by § 1447(d) from

reviewing that order." 151 F.3d at 167. "If we have any doubt about the correctness of this analysis, we are authorized in these circumstances to issue a writ of mandamus. To avoid forfeiting the federal courts' role of reviewing LHWCA coverage issues is one of those extraordinary situations envisioned in *Thermtron* for exercise of the writ." *Id.* at 167-68. Precisely the same reasoning is applicable here.

Hence, § 1447(d) does not provide a reason to deny review. If anything, any conflict between the Fifth Circuit and the other courts of appeals regarding the interpretation of § 1447(d) would provide a further reason to grant review.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should grant the petition, vacate the judgment below, and remand for reconsideration in light of *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004).

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